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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

WORCESTER COUNTY TRUST COMPANY,
Executor,
Petitioner,

vs.

RAY L. RILEY, CONTROLLER, ET AL,
Respondents.

No. [redacted] 34

BRIEF OF
JAMES A. BRANCH and DANIEL MacDOUGALD, AS AMICI CURIAE

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Curtiss Printing Company, Inc., Atlanta

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No. 922

BRIEF OF JAMES A. BRANCH and DANIEL MacDOUGALD, AS AMICI CURIAE

The undersigned James A. Branch and Daniel MacDougald respectfully ask leave of the Court to file the following brief as amici curiae herein.

The undersigned appear as counsel of record for Hughes Spalding and Julian Riley, as executors of the will of Julia M. Hungerford in the case of Spalding and Riley, executors, v. Homer C. Parker, et al., of and constituting the State Revenue Commission of Georgia, and Mark Graves, et al., of and constituting the State Tax Commission of the State of New York, No. 343, Equity, in the District Court of the United States for the Southern District of Georgia, Savannah Division, wherein identical questions of law involved in this case are presented for determination.

Counsel for the petitioner herein and counsel for the respondents herein have consented to the filing of this brief.

We respectfully urge that the petition for certiorari be granted, because: the question whether the Federal Interpleader Act, as amended January 20th 1936 (section 24 (26) of the Judicial Code, as amended January 20th 1936) affords an available remedy to representatives of the estate of a deceased person where there are threats from the taxing authorities of two or more states to assess and collect inheritance or succession taxes on the intangibles belonging to such estate under conflicting and inconsistent claims that each of such states was the state of the domicile of the decedent, is a question of widespread public interest and of vital concern and should be authoritatively settled by the decision of this Court.

1.

Unless the present Federal Interpleader Act affords an available remedy in such cases, there is the ever present possibility and danger of the estate being required to pay inheritance or succession taxes in two, or even more, states upon the same taxable event, as having occurred at the same time, and with respect to the same property, in each of two or more states.

Although it is now settled that no state may, consistently with due process, impose a tax upon a transfer, by death, of intangibles forming a part of the estate of a decedent whose domicile was outside the state (*First National Bank v. Maine*, 284 U. S. 312), there was in many cases, up to the time the present Federal Interpleader Act was enacted, no available effective remedy to prevent the exaction of such a tax by two or more states on conflicting and inconsistent claims that the decedent was domiciled in each of such states; because,

where the question had to be tried separately as to each state, a finding of existence of domicile in one of the states was not binding, or even admissible, on the claim of any other state; and, since the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error (*Milwaukee Electric Railway & Light Company v. Wisconsin*, 252 U. S. 100, 106), there was no practical recourse in such cases against conflicting and inconsistent decisions as to such domicile.

2.

It is respectfully urged that the present Federal Interpleader Act is available in such cases as against the objection urged to it, and applied by the Circuit Court of Appeals of the First Circuit, in the majority opinion, that the respondents "are sued as representatives and agents of" their respective states and, therefore, "that the states themselves have been interpleaded"; that the adverse claimants are not "citizens of different states". The Act (Judicial Code, section 24 (26)) provides that it is available where "two or more adverse claimants, citizens of different states, are claiming to be entitled to such money or property, or to any one or more of the benefits arising * * * by virtue of any such obligation". It has often been held by this Court that the prohibitions and guarantees of the Fourteenth Amendment are addressed to, and control, not only the states, but also every person, whether natural or juridical, who is the repository of state power, and that recourse may be had to the Federal courts to prevent a violation of the provisions of the Fourteenth Amendment by such persons; that (although the provisions of the Fourteenth Amendment do not apply as between private individuals) anyone who is in possession of state power and attempting to use that power to the doing of the wrongs which the amendment forbids may be prevented

from so doing by a Federal court. *Home Telephone & Telegraph Company v. Los Angeles*, 227 U. S. 278; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239.

a) If such a suit is to be regarded as one against the state, as distinguished from one against officials of the state in possession of state power, and who are attempting to use that power for the doing of the wrongs which the Fourteenth Amendment forbids, then the Federal courts might be deprived of jurisdiction by virtue of the provisions of the Eleventh Amendment.

In discussing this question in *Home Telephone & Telegraph Company v. Los Angeles*, 227 U. S. 278, 285, Mr. Chief Justice White, speaking for the court, said:

> "It is manifest that, in necessary operation, the doctrine which was sustained would, in substance, cause the state courts to become the primary source for applying and enforcing the constitution of the United States in all cases covered by the 14th Amendment.
>
> "It would certainly be open to controversy if the proposition were carried to its logical result, whether the only right under the 14th Amendment, which the proposition admits, to exert Federal judicial power growing out of wrongful acts of state officers, would not be unavailing. This naturally suggests itself, since, if there be no right to exert such power until, by the final action of a state court of last resort, the act of a state officer has been declared rightful and to be the lawful act of the state as a governmental entity, the inquiry naturally comes whether, under such circumstances, a suit against the officer would not be a suit against the state, within the purview of the 11th Amendment. The possibility of such a result, moreover, at once engenders a further inquiry; that is, whether the effect of the

proposition would not be to cause the 14th Amendment to narrow Federal judicial power instead of enlarging it and making it more efficacious. * * *

"To repeat: for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer, in virtue of the state power, is doing an act which, if permitted to be done, prima facie would violate the Amendment, the subject must be tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority. * * *

" 'Congress, by virtue of the fifth section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion.' "

b) Whenever a state official, who purports to act under state authority and power, is sued in a Federal court to prevent the consummation of a wrong under color of state authority, the question is involved whether such state official is acting under, and in accordance with, a valid law of the state, and not contrary to the provisions of the Federal Constitution. If it is determined that he is so acting, then the suit fails. Otherwise, it cannot be regarded as a suit against the state. *Traux v. Raich*, 239 U. S. 33.

c) It would therefore seem to follow that, on the one hand, in order for the provisions of the Fourteenth Amendment to apply, and for the Federal courts to have jurisdiction on that ground, the action of the state authorities, sought to be prevented, must be regarded as the action of the state, or, at least, of the officers acting as representatives of the state (*Raymond v. Chicago Union Traction Company*, 207 U. S.

20; *Home Telephone & Telegraph Company v. Los Angeles*, 227 U. S. 278); and, on the other hand, if a suit to prevent such action is regarded as one against the state, then, under the Eleventh Amendment, the Federal courts are without jurisdiction to entertain the suit.

d) We therefore submit that it does not follow that because the respondents were sued as representatives and agents of their respective states the court was without jurisdiction on the ground that "the states themselves have been interpleaded", or that jurisdiction is defeated on the ground that the adverse claimants are not "citizens of different states". *Chicago Great Western Railway Company v. Kendall*, 266 U. S. 94; *Sterling v. Constantin*, 287 U. S. 378.

In *Chicago Great Western Railway Company v. Kendall*, *supra*, suit was brought in the District Court of the United States against the governor, the secretary of state, the auditor and the treasurer, and another, constituting the executive council of the State of Iowa. The suit was by an Illinois corporation, Chicago Great Western Railway Company. It was said by the Court, Mr. Chief Justice Taft delivering the opinion: (page 97)

> "Jurisdiction of the bill * * * exists because of the diverse citizenship of the parties."

3.

It is also submitted that the fact that the officials of one of the states will be found to have been acting under, and not contrary to, valid state laws—it being uncertain which set of officials are so acting—would not deprive the court of jurisdiction any more than would be true in any case where it is uncertain whether the officials of a single state who are

sued on the theory that they are acting contrary to law, or under an unconstitutional enactment. The fact that the case, on its merits, is decided in favor of the officials sued does not lead to the conclusion that the court was without jurisdiction to entertain the suit. Compare: *Chicago Great Western Railway Company v. Kendall*, 266 U. S. 94, where it was held that the district court of the United States had jurisdiction but the case was decided, on its merits, in favor of the taxing officials.

In the instant case petitioner could, aside from the question of venue, have instituted separate suits against the respondents without violence to the Eleventh Amendment. Surely, this is sufficient basis for the right to interplead these respondents. The Interpleader Act removes any difficulty as to venue.

4.

Another reason urged by the respondents, and held by the court below, why the act is not applicable to cases of this character is that the act provides:

> "(d) Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be necessary or convenient to carry out and enforce the same."

It is said that this provision of the act cannot be complied with for the reason that the state is the real party at interest and a discharge against the officials would not be binding upon the state. It seems to us, and we respectfully submit, that a permanent injunction granted by the court against the officials of that state which is found to be the non-domiciliary state would, to all intents and purposes, operate as a dis-

charge of the complainant from further liability to those officials, and the state which they represent, just as much so as in the numerous cases where the Federal courts have enjoined taxing officials of states from exacting taxes in violation of the provisions of the Fourteenth Amendment.

This provision of the act does not require that the final discharge shall be granted immediately upon the granting of the judgment of interpleader. The final discharge from liability may, under the terms of the act, be withheld until all questions involved in the cause are determined and the decree of the court complied with.

Respectfully submitted,

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